(1) Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

LARRY MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID C. THOMAS
Counsel of Record for Petitioner
53 W. Jackson Blvd.
Suite 1362
Chicago, Illinois 60604
(312) 957-0100

L. ARON PENA
Counsel for Petitioner
600 South Closner
Edinburg, Texas 78539
(956) 383-5311

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether it is consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to a within-Guidelines sentence, and to use that presumption to justify a sentence without an analysis by the district court of the 18 U.S.C. § 3553 (a) factors?

II. Whether it was a violation of Petitioner's rights under the Sixth Amendment for the District Court to determine facts regarding so-called relevant conduct based upon a preponderance of the evidence, which raised Petitioner's Guideline range from 36 to 47 months to a range of 108 to 135 months, where Petitioner was sentenced to 108 months?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	16
Table of Appendices	17
Appendix	A1

TABLE OF AUTHORITIES

Page

CASES:

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000) 13, 14, 15

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004) 13

Collins v. State, 697 So. 2d 1305 (Fla. Dist. Ct. App. 4th Dist. 1997) 15

Cunningham v. California, ___ U.S. ___, 127 S. Ct. 856 (2007) 13

Rita v. United States, 177 Fed. Appx. 357 (4th Cir. 2006), cert. granted, 127 S. Ct. 855 (Mem.), 166 L. Ed. 2d 681 (2007) 9, 12

United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005) ..... *passim*

United States v. Clairborne, 439 F.3d 479 (8th Cir. 2006) 6

United States v. Cunningham, 429 F.3d 673 (7th Cir. 2005) 11

United States v. Dalton, 404 F.3d 1029 (8th Cir. 2005) 11

United States v. Lincoln, 413 F.3d 716 (8th Cir. 2005) 6

United States v. Meyer, 452 F.3d 998 (8th Cir. 2006) 9

United States v. Okai, 454 F.3d 848 (8th Cir. 2006) 15

Wisconsin v. Mitchell, 508 U.S. 476, 113 S. Ct. 194 (1993) 14

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. VI 1

STATUTES:

18 U.S.C. § 3553 ..... *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

OTHER AUTHORITIES:

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988) 7

Jose Cabranes and Kate Stith, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998) 8

U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004) 7

U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* (October, 2003) 8

U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987) 7

U.S. Sentencing Guidelines, Ch. 1, Pt. A(3) (1988) 7

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is attached as Appendix A1-A2.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1). The jurisdiction of the United States Court of Appeals for the Eighth Circuit was based on 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . "

18 U.S.C. 3553, Imposition of a Sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but no greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994Q) of title (28); and

(ii) that, except as provided in section 3 742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the

Sentencing Commission pursuant to section 334(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 334Q) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 334(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

Petitioner Larry Miller entered a guilty plea to a two count indictment. Count I charged the distribution of 2.8 grams of methamphetamine on February 16, 2006. Count

II charged the distribution of 5.6 grams of methamphetamine on February 24, 2006. Based solely upon his guilty plea, Mr. Miller's advisory Guidelines range was 37 to 46 months imprisonment. At the sentencing hearing the Government, over Mr. Miller's objection, called an informant and used his testimony to argue that the distribution of an additional 5,500 grams of methamphetamine should be attributed to Mr. Miller as relevant conduct. Mr. Miller testified that the relevant conduct accusations were not true. However, the District Court found that the relevant conduct allegations had been proven by a preponderance of the evidence. This judicial finding raised Mr. Miller's advisory Guidelines range to 108 to 135 months.

After the relevant conduct finding, Mr. Miller's trial attorney argued in mitigation that Mr. Miller had been addicted to methamphetamine for ten years, and that he had exhibited remorse and responsibility for the criminal conduct charged in the indictment. In his elocution to the Court, Mr. Miller confirmed that he was an addict who was seeking drug treatment. He also stated, "I'm guilty of the charges. I'm not guilty of the relevant conduct . . . " (App. at A5)

The District Court imposed the Guidelines sentence with the explanation:

> Pursuant to the Sentencing Reform act of 1984, it is the judgment of the court that the defendant Larry K. Miller is hereby committed to the custody of the Bureau of Prisons, to be imprisoned for a term of 108 months . . . Based upon the serious nature of the instant offense which involved distribution of methamphetamine, and in consideration of the defendant's minimal criminal history, an aggregate sentence of 108 months

> imprisonment, which represents ~ low end of the guidelines range, followed by a five-year term of supervised release, would seem to address the sentencing objectives of just punishment, general deterrence, and incapacitation.

Id. at A7-A9.

Not once did the Court refer to the Guidelines as advisory, rather than mandatory, and not once did the Court even mention 18 U.S.C. § 3553.

Mr. Miller appealed his sentence to the Eighth Circuit Court of Appeals. He argued that the manner in which the sentence was imposed violated his rights under the Fifth and Sixth Amendments to the United States Constitution because he was sentenced far in excess of the maximum sentence permitted by his guilty plea, based solely upon uncharged conduct determined only by a judge based upon a preponderance of the evidence. He also contended that the Eighth Circuit had misinterpreted this Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 735 (2005), by according a presumption of reasonableness to a sentence imposed within the Guidelines range. Finally, he argued that his sentence was "unreasonable," within the meaning of Booker, because the record demonstrated that the District Court failed to consider the factors set forth in § 3553(a) to determine whether to impose a sentence under the Guidelines or a non-Guidelines sentence.

The Eighth Circuit affirmed in an unpublished, *per curiam* opinion. Relying upon its own precedent, the Eighth Circuit held that "due process is satisfied when sentencing facts are found by a preponderance of the evidence" by the judge at the sentencing hearing.

(App. at A2) The Court of Appeals also rejected the reasonableness argument because "we have made it clear nothing in § 3553(a) or in the Booker remedy opinion, requires robotic incantations that each statutory factor has been considered." (App. at A3)

Petitioner seeks a writ of *certiorari* to review this decision.

REASONS FOR GRANTING THE WRIT

I. This Case Presents The Same Issues Which This Court Will Decide In Rita v. United States Because The Eighth Circuit Accords A Presumption Of Reasonableness To A Sentence Within The Guidelines Range, And Used That Presumption To Justify Petitioner's Sentence, Which Was Imposed Without An Analysis By The District Court Of The 18 U.S.C. 3553(a) Factors.

The Eighth Circuit Court of Appeals has explicitly adopted a presumption that a sentence within the Guidelines sentencing range is reasonable within the meaning of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). See, *e.g.*, *United States v. Clairborne*. 439 F.3d 479, 480 (8th Cir. 2006) (sentence within range presumed reasonable because "[t]he Guidelines were fashioned taking the [sec. 3553(a) factors] into account and are the product of years of careful study."); *United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005) (same).

In his Brief to the Court of Appeals, Petitioner argued that such a presumption is unwarranted, and is inconsistent with *Booker* because it has resulted in sentences which are anything but reasonable. Petitioner explained

that the notion that the Guidelines incorporate the section 3553(a) factors is not accurate according to the Sentencing Commission's own reports, the Guidelines manual, and reliable historical sources, including Justice Breyer. While Congress expected the Sentencing Commission to consider all the section 3553(a) factors, the Commissioners "considered" only "just deserts" and "crime control," and then expressly abandoned those two purposes when they could not agree on which should predominate. U.S. Sentencing Guidelines, Ch. 1, Pt. A(3) (1988). They solved their "philosophical dilemma" by adopting an "empirical approach that uses data estimating the existing sentencing system as a starting point," but did not follow that approach either. *Id.* They implemented sentences "significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts", including drug offenses. U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 47 (2004).

These deviations from past practice resulted from "trade-offs among Commissioners with different viewpoints", said then Judge and Commissioner Breyer. In response to complaints that the original guidelines were "too harsh," he said that "once the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad" and the "resulting compromises do not seem too terribly severe." In any event, the system was "evolutionary" and would be improved based on information from actual practice under the guidelines. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 18-20, 23 (1988).

Moreover, as the Commission has repeatedly said, it is simply not possible to write a single set of guidelines which take into account all factors that are potentially relevant to sentencing decisions. See, U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* at 3-4 (October, 2003). The Commission has affirmatively rejected most relevant mitigating factors. See, *e.g.*, secs. 5H and 5K. On the other hand, the Guidelines require increases for a vast and complicated array of aggravating offense characteristics. They purport to make relevant distinctions based on quantifiable "harms," while disregarding, restricting or prohibiting consideration of factors that bear on personal culpability, such as *mens rea*, motive, mistake, and mental and emotional problems. This works in one direction only, as intended "harms" increase the sentence whether or not they occurred, while "harms" that were unintended, unknown, fortuitous, or arranged by law enforcement are often counted. The Commission "has never explained the rationale underlying any of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic." Jose Cabranes and Kate Stith, *Fear of Judging: Sentencing Guidelines in the Federal Courts*, 69 (1998).

It is also important to note that the plain language of section 3553(a) does not support the presumption. The pesumption endows the Guidelines with a privileged status among the section 3553(a) factors which is found nowhere in the words of the statute (or in this Court's opinion in *Booker*). It also ignores the so-called parsimony provision, which is the primary directive in section 3533(a), that a sentence be "sufficient, *but not greater than*

necessary," to implement the statutory factors. (emphasis added). Reasonableness is a range, not a point, and so a sentence can be reasonable but still greater than necessary to achieve the purposes of sentencing.

The sentencing pattern in the Eighth Circuit, very much like the Fourth Circuit from which Rita arises, graphically demonstrates how far the courts have strayed from the statute: only one of 22 above-Guidelines sentences appealed by defendants has been reversed, while 27 of 28 below-guidelines sentences appealed by the government have been vacated as unreasonable. Brief of the New York Counsel of Defense Lawyers as Amicus Curiae in Support of Petitioner in *Rita v. United States*, No. 06-5754, at 7. See also, *United States v. Meyer*, 452 F.3d 998, 1000 fn.3 (8th Cir. 2006).

These statistics dramatically portray how *Booker* has been stood on its head in the Eighth Circuit: a decision that was intended to be a protection for defendants has instead been used as a sword to leave defendants worse off than they were before. *Meyer* is an excellent example. His range was 121 to 151 months but he was sentenced to 270 months. The rationale was that, *if he had committed the offense a year later*, he would have faced a mandatory 360 month sentence! Meyer and many other defendants in the Eighth Circuit can only rue the day *Booker* was decided, and that is most certainly not what this Court was trying to accomplish.

Of course the Eighth Circuit did not abandon its presumption in response to Petitioner's arguments. Instead it used the presumption to affirm Petitioner's sentence, even though:

(1) The District Court never alluded to section 3553(a) and never even mentioned the majority of the factors set forth therein;

(2) No consideration at all was given to imposing a non-guidelines sentence; and

(3) Most important, there was no mention or discussion of the parsimony provision of section 3553(a).

There is not even a mention that the Guidelines are advisory, rather than mandatory. It is impossible to read the transcript of the sentencing hearing in this case without concluding that the District Court did not consider anything other than a Guidelines sentence. Why is a prison sentence of 108 months sufficient, but not greater than necessary, for a 46-year-old meth addict whose only prior conviction (in state court, for possession of meth for which he received probation) was over 12 years earlier? That fundamental question is never posed nor answered by the District Court.

The Eighth Circuit's opinion dismisses Petitioner's argument by noting the District Court's passing reference that the sentence "would seem to address" the sentencing objectives of just punishment, deterrence, and incapacitation, and concluding that "we have made it clear that nothing in § 3553(a) or in the Booker remedy opinion requires robotic incantations that each statutory factor has been considered." (App. at A3)

Of course, this is a "straw man" because Petitioner was not arguing for a "robotic incantation". Rather he was arguing, as stated above, that reasonableness is a range, not a point, and that in fashioning a sentence a district court must simply explain why the sentence is sufficient

but not greater than necessary, and give some indication that the section 3553(a) factors guided that decision.

Petitioner's argument is consistent with Eighth Circuit precedent. See, *e.g.*, *United States v. Dalton*. 404 F.3d 1029, 1033 (8th Cir. 2005) ("we will not infer a reasoned exercise of discretion from a record that suggests otherwise or is silent"). It is also consistent with precedent from other Circuits, such as *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005), where Circuit Judge Posner states:

> [W]henever a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, before we can conclude that the judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise.

The absence of a requirement that district courts explain in section 3553(a) terms the reasons for the sentence imposed, like the presumption that a within-Guidelines sentence is reasonable, very much encourages a "busy judge to impose the guidelines sentence and be done with it, without wading into the vague and prolix statutory factors." *Id.* at 679.

This description perfectly depicts what took place in the case at bar: the District Court imposed the Guidelines sentence and was done with it. Protected by the presumption, she rotely opted for the Guidelines sentence without any stated justification for doing so, other than that it was a Guidelines sentence. This procedure falls far short of the "reasonableness" requirement envisioned by *Booker* and,

indeed, prevents any meaningful appellate review of whether that requirement has been fulfilled.

Since these same issues will soon be decided by this Court in *Rita v. United States*, 177 Fed. Appx. 357 (4th Cir. 2006), cert. granted, 127 S. Ct. 855 (Mem.), 166 L. Ed. 2d 681 (2007), a writ should be granted in this case so that Petitioner will be in a position to benefit if *Rita* is decided in a manner favorable to Petitioner's cause.

II. It Was A Violation Of Petitioner's Rights Under The Sixth Amendment For The District Court To Determine Facts Regarding So-Called Relevant Conduct Based Upon A Preponderance Of The Evidence, Which Raised Petitioner's Guidelines Range From 36 To 47 Months To A Range Of 108 To 135 Months, Where Petitioner Was Sentenced To 108 Months.

Petitioner's guilty plea admitted the distribution of 8.4 grams of methamphetamine. Since he was a criminal history Category I, his Guidelines range was 37 to 46 months.

However, the District Court sentenced Petitioner for distribution of over 5,000 grams. This was based solely upon the testimony of a single informant at the sentencing hearing. Although Petitioner also took the stand and denied the informant's allegations, the District Court, using a preponderance standard, determined that Petitioner was responsible for the distribution of approximately 5,500 additional grams as "relevant conduct". This judicial finding concerning uncharged conduct raised Petitioner's range to 108 to 135 months, and he was sentenced to 108 months.

In his brief to the Eighth Circuit Court of Appeals, Petitioner argued that this procedure violated his rights under the Sixth Amendment. Among other cases Petitioner cited, this Court's decisions in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), both of which are based upon *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).

To that list must be added this Court's recent decision in *Cunningham v. California*, ___ U.S. ___, 127 S. Ct. 856 (2007), where the Court described California's determinate sentencing law (DSL) as assigning "to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence. The facts so found are neither inherent in the jury's verdict nor embraced by the defendant's plea, and they need only be established by a preponderance of evidence, not beyond a reasonable doubt." 127 S. Ct. at 860.

This Court struck down the law as violative of a defendant's Sixth Amendment rights:

> This Court has repeatedly held that, under the Sixth Amendment, any facts that expose a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.

Id. at 863-64.

In discussing *Blakely*, the Court observed that if "the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." *Id.* at 869.

It is extremely significant that both California, as well as the principle dissent authored by Justice Alito, equated the DSL system with the post-*Booker* federal system. That argument was rejected in these terms:

> Reasonableness, however, is not . . . the touchstone of Sixth Amendment analysis. The reasonable requirement *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints . . . It is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable. *Booker's* remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless.

Id. at 870. (emphasis in original).

The Eighth Circuit paid scant attention to Petitioner's argument. Its cursory opinion simply identified its own precedent for the proposition that "due process is satisfied when *sentencing facts* are found by a preponderance of the evidence. (App. at A2) (emphasis added). Petitioner had specifically identified that precedent as misguided, but the Court of Appeals took no notice of that criticism.

It is noteworthy that the Eighth Circuit used the phrase, "sentencing facts", because this is language straight from cases which have been thoroughly discredited by the *Apprendi* line of cases. See, *e.g.*, *Wisconsin v. Mitchell* 508 U.S. 476, 113 S. Ct. 194 (1993). It is also apparent that the procedure approved by the Eighth Circuit in this case, where it can truly be said that the "sentencing tail wags the dog of the substantive offense", would indeed render this Court's Sixth Amendment caselaw toothless.

Petitioner's guilty plea admitted the distribution of 8.4 grams, but based solely upon a judicial finding of fact supported only by a preponderance of the evidence, Petitioner was punished for the distribution of approximately 5,500 grams. This travesty is exactly what the *Apprendi* line of cases is designed to prohibit.

The nub of the issue in the post-*Booker* federal sentencing scheme is what, for *Apprendi* purposes, is the maximum sentence a judge may impose solely on the basis of the facts admitted by the defendant. The Eighth Circuit has seized upon *Booker's* remedial opinion, rendering the Guidelines advisory rather than mandatory, to hold that the maximum sentence for *Apprendi* purposes has reverted back to the statutory maximum. See, *e.g.*, *United States v. Okai*, 454 F.3d 848, 851 (8th Cir. 2006). But, as Petitioner pointed out in his Brief in the Court of Appeals, this misguided interpretation nullifies the *Apprendi* line of cases because it sanctions a return to pre-*Apprendi* sentences driven by relevant conduct findings, rather than findings by a jury or admissions by a defendant. Moreover, the interpretation makes no sense because a sentence above the Congressionally authorized statutory maximum would be illegal and void; one would not need to look to Sixth Amendment analysis to invalidate such a sentence. See, *e.g.*, *Collins v. State*, 697 So. 2d 1305, 1306-07 (Fla. Dist. Ct. App. 4th Dist. 1997) (*en banc*) (court is without jurisdiction to impose sentence in excess of statutory maximum, and excess portion of sentence is void).

Therefore, for *Apprendi* purposes, the "maximum sentence" must remain the Guideline range authorized by the jury's verdict or the defendant's plea. This is so because to authorize a higher range, which is the starting point in fashioning a reasonable sentence, findings of fact

must be made. This Court's Sixth Amendment jurisprudence now requires that those findings be made by a jury beyond a reasonable doubt.

For the reasons set forth above, the Writ should issue because the procedure used to calculate Petitioner's sentence violated his rights under the Sixth Amendment.

CONCLUSION

For all the reasons set forth above, a writ of *certiorari* should issue in this case, Petitioner's sentence should be vacated, and this case should be remanded for further proceedings.

Respectfully submitted,

DAVID C. THOMAS
Counsel of Record
for Petitioner
53 W. Jackson Blvd.
Suite 1362
Chicago, Illinois 60604
(312) 957-0100

TABLE OF APPENDICES

Page

Opinion of the United States Court of Appeals for the Eighth Circuit A1

Excerpts of Transcript of Sentencing Hearing Dated August 28, 2006 ..... A4

2007 WL 216293

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-3286

United States of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	District Court for the Eastern
v.	*	District of Missouri
	*	
Larry K. Miller,	*	[UNPUBLISHED]
	*	
Appellant.	*	

Submitted: January 10, 2007
Filed: January 29, 2007

Before LOKEN, Chief Judge, BYE and SHEPHERD, Circuit Judges.

PER CURIAM.

The district court[1] sentenced Larry K. Miller to a 108-month sentence after he pleaded guilty to two counts of distributing methamphetamine. We affirm.

---

[1] The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

Miller argues his Fifth and Sixth amendment rights were violated by an unreasonably long sentence, the plea agreement was "illusory" for lack of consideration and, in the alternative, the government breached the agreement when it requested his sentence be enhanced based on his relevant conduct.

A two-stage standard of review applies to sentences imposed by district courts. In the first step we review the district court's application of the sentencing guidelines de novo and its factual findings for clear error. Then the sentence is reviewed for reasonableness based on 18 U.S.C. § 3553(a) factors. *United States v. Wallace,* 413 F.3d 734, 743 (8th Cir. 2005). The review for reasonableness under *United States v. Booker*, 543 U.S. 220 (2005), is akin to abuse of discretion review. *United States v. Rogers*, 423 F.3d 823, 829 (8th Cir. 2005). A district court's relevant-conduct findings are reviewed for clear error. *United States v. Ault*, 446 F.3d 821, 823 (8th Cir. 2006).

Miller argues courts are required to use the "beyond a reasonable doubt" standard to determine any facts during the sentencing phase of the trial. This is simply not the case; we have held due process is satisfied when sentencing facts are found by a preponderance of the evidence. *United States v. Okai*, 454 F.3d 848, 851 (8th Cir. 2006).

Miller claims his sentence is unreasonable within the meaning of *Booker* because the district court failed to consider the factors set forth in § 3553(a) to determine whether to impose sentence under the guidelines or a non-guideline sentence. This cannot be supported by the record in this case. The district court specifically noted that the sentence imposed addressed objectives of just punishment, deterrence, and incapacitation – all § 3553(a) objectives.

Moreover, we have made it clear nothing in § 3553(a) or in the *Booker* remedy opinion requires robotic incantations that each statutory factor has been considered. *United States v. Lamoreaux,* 422 F.3d 750, 756 (8th Cir. 2005).

Miller's argument about his plea agreement being illusory also fails. The government's promise not to seek any further charges against Miller arising from the underlying facts represents far more than a peppercorn of consideration to Miller. Likewise, nothing in the plea agreement forbade the government from presenting additional evidence at the sentencing hearing.

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

THE UNITED STATES
OF AMERICA,

Plaintiff,

vs. No. 1:06-CR-47 JCH

LARRY MILLER,

Defendant.

PRESENT: The Honorable Jean C. Hamilton, Presiding

ATTORNEY FOR PLAINTIFF: Abbie Crites-Leoni, Assistant United States Attorney

ATTORNEY FOR DEFENDANT: Cameron Bunting Parker

Sentencing Hearing

August 28, 2006

TERI HANOLD HOPWOOD
Registered Merit Reporter
Thomas F. Eagleton Courthouse
111 South Tenth Street
St. Louis, MO 63102

* * *

[41] offered by the Presentence Report of a total offense level of level 31. Were there any other objections then that you wanted to raise, Ms. Parker?

MS. PARKER: No, Your Honor.

THE COURT: Okay. Then if you all would step up. At this time, Ms. Parker, is there anything further you

would like to state on behalf of Mr. Miller, and then of course he will have an opportunity to make any statements.

MS. PARKER: I'd like to make a statement. Mr. Miller is very remorseful. He has been addicted to meth for quite sometime, since 1996. We would ask that he be placed in some sort of drug program to help him overcome his addiction.

Mr. Miller has numerous friends and family here today on his behalf, and he has also submitted to Your Honor numerous letters from people in the community and his friends and family regarding his good character.

THE COURT: Thank you. I have those and have reviewed those, and they will be part of the record.

MS. PARKER: Mr. Miller would also like to make a statement.

THE COURT: Mr. Miller, at this time is there anything you would like to state to the Court? Step in front of the microphone.

THE DEFENDANT: I'm guilty of the charges. I'm not [42] guilty of the relevant conduct, and if I have to go to jail, I want to go to jail and not be just a part of the system, but where I can rehabilitate the guy sitting beside me. My family and my community needs me, and if you could spare my life in this instance, Your Honor, because I'm guilty what the charges [sic], and I do want to seek drug treatment, and thank you.

THE COURT: Thank you. Ms. Crites-Leonis, anything on behalf of the Government?

MS. CRITES-LEONI: Yes, Your Honor. As the Government has stated in the sentencing memorandum that was filed in this case last week, there are substantial reasons why the particular sentencing range that is applicable in this case is appropriate. That range is based on the Court's finding of a total offense level of 31, and provides for a sentencing range of 108 to 135 months.

The Government is requesting a sentence at the mid to upper end of that guideline range, based on the sophisticated nature of this defendant's operations, the length of the operation, and his lack of ability to fully accept responsibility for his past. Mr. Miller's testimony here today and his statement to this Court was simply that he was only guilty of what he was caught doing on videotape, on audiotape. Certainly Mr. Powell, who testified here this morning, would not have been able to make purchases of methamphetamine from Mr. Miller had he not had a prior relationship with Mr. Miller. [43] The evidence provides that this defendant distributed methamphetamine to Mr. Powell on multiple occasions. He began trafficking methamphetamine as early as the year 2002. He was convicted of a prior felony controlled substance offense. He received multiple pounds of methamphetamine for distribution on numerous occasions over a multiple year time frame, and received as much as ten pounds of methamphetamine at one time that was observed by a witness who testified here in this very court.

Finally, he was a sophisticated distributor of methamphetamine in that he utilized extreme methods for concealing and transporting large quantities methamphetamine, and whether that be the person who brought it to him, or if that was a measure that was utilized by the defendant as far as ordering those items and saying that they should be

distributed in a concealed compartment in a transfer case, or whatever the case may be on prior occasions, this was a sophisticated drug trafficker, and that's why he has gone undetected for this length of time.

So, it is at this time, Your Honor, that the Government is respectfully requesting a sentence at the mid to upper guideline range that has been found to be applicable in this case. Thank you.

(A conference was had off the record.)

THE COURT: Pursuant to the Sentencing Reform Act of [44] 1984, it is the judgment of the Court that the defendant Larry K. Miller is hereby committed to the custody of the Bureau of Prisons, to be imprisoned for a term of 108 months. This term consists of a term of 108 months on each of Counts I and II, the terms to be served concurrently.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of a term of five years on Count I, and five years on Count II, the terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district into which he is released.

While on supervision, the defendant shall comply with the standard conditions adopted by this Court, and the following additional conditions.

First, the defendant shall refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of commencement of supervision, and at

least two periodic drug tests thereafter for use of a controlled substance.

Second, the defendant shall participate in a drug or alcohol abuse treatment program approved by the United States Probation Office, which may include substance abuse testing, counselling, residence in a community corrections center, residence in a comprehensive sanction center, residential reentry center, or inpatient treatment in a treatment center or [45] hospital.

The defendant shall pay for the costs associated with substance abuse services based on a copayment fee established by the United States Probation Office. Co-payments shall never exceed the total costs of service provided.

Third, the defendant shall participate in a mental health program approved by the United States Probation Office. The defendant shall pay for the costs associated with services provided based on a co-payment fee established by the United States Probation Office. Co-payments shall never exceed the total costs of services provided.

The Court finds the defendant does not have the ability to pay a fine. It is further ordered that the defendant shall pay to the United States a special assessment of $100 on each of Counts I and II, for a total of $200. It shall be due immediately.

Based upon the serious nature of the instant offense which involved distribution of methamphetamine, and in consideration of the defendant's minimal criminal history, an aggregate sentence of 108 months imprisonment, which represents the low end of the guidelines range, followed by a five-year term of supervised release, would seem to

address the sentencing objectives of just punishment, general deterrence, and incapacitation.

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54

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No. 06-1420

In the Supreme Court of the United States

LARRY K. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the procedures applied in the determination of his sentence are not in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005). On November 3, 2006, this Court granted certiorari in *Claiborne* v. *United States*, No. 06-5618, and *Rita* v. *United States*, No. 06-5754, to address various aspects of sentencing procedure under *Booker*. Because the proper disposition of the petition for a writ of certiorari may be affected by the Court's resolution of *Claiborne* and *Rita*, the petition should be held pending the decisions in those cases, and then disposed of as appropriate in light of those decisions.[*]

[*] The government waives any further response to the petition unless this Court requests otherwise.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MAY 2007